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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID ARENAS GARCIA

v.

VINCENT GUADINI

FILED CIVIL ACTION

FEB 10 2009

NO. 08-3921

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

ORDER

AND NOW, this 10th day of February, 2009, upon consideration of the Petition for Writ of Habeas Corpus (Document No. 1), the status of the criminal charges against the petitioner in the Court of Common Pleas of Lancaster County at Docket No. CP-36-CR-0004061-2007 (Document No. 8), the Report and Recommendation filed by United States Magistrate Judge Arnold C. Rapoport, and the lack of any objections to the report, it is ORDERED that:

1. The Report and Recommendation of Magistrate Judge Rapoport is APPROVED and ADOPTED;
2. The Petition for Writ of Habeas Corpus is DENIED and DISMISSED WITHOUT PREJUDICE;¹ and
3. There is no probable cause to issue a certificate of appealability.

X^c D. Garcia
ACR

Timothy J. Savage
TIMOTHY J. SAVAGE, J.

¹Petitioner filed his petition for a writ of habeas corpus prior to the disposition of his pending criminal charges. Because all his claims are unexhausted, the petition does not qualify as a "first" petition under AEDPA. See *Benchoff v. Collieran*, 404 F.3d 812, 819-820 (3d Cir. 2005). Therefore, we shall dismiss it without prejudice instead of staying it pursuant to *Rhines v. Weber*, 125 S. Ct. 1528 (2005); see also *Crews v. Horn*, 360 F. 3d 146 (3d Cir. 2004).